

FIRST AMENDMENT LIMITATIONS ON RECOVERY FROM THE PRESS—AN EXTENDED COMMENT ON “THE ANDERSON SOLUTION”

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I. INTRODUCTION

Twenty years ago, the Supreme Court switched the orbit of libel law from far out frozen darkness¹ to the sunny warmth of the first amendment.² A generation later, commemorative conferences like this one are being held to celebrate *New York Times Co. v. Sullivan*,³ the landmark case responsible for the change. Yet our mood is far less festive than it should be in these circumstances. Something odd has happened. Several odd things have happened.

On one hand, as a consequence of *New York Times Co. v. Sullivan*, it now appears that the first amendment sometimes operates to defeat claims unfairly. These are the ordinary civil claims of people who lack the personal means of publicity to correct false and damaging statements that have hurt them, but who cannot satisfy the actual malice standard required of them in order to receive any redress.⁴ They may suffer actual harm and yet get noth-

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1. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined . . . classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . the libelous. . . .” (footnote omitted)).

2. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”). The seminal review of the case is Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191. With prophetic understatement, Kalven noted: “It is not easy to predict what the Court will see in the *Times* opinion as the years roll by.” *Id.* at 221. Three years later he framed the basic question in the following way, and it is still this question that awaits a satisfactory answer: “At what point does the First Amendment no longer permit the states to afford tort remedies for harms caused by speech?” Kalven, *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 278.

3. 376 U.S. 254 (1964).

4. The most usual formula of the standard appears in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (“There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”). See also Bose

ing. On the other hand, the vulnerability of publishers to spectacular awards of damages when the proper modicum of scienter has been shown has depressed members of the fourth estate. Indeed, in some respects, rather than *New York Times Co. v. Sullivan* having ushered in a new era of press freedom, some segments of the press believe they are substantially worse off than in the unprotected days before 1964.

"Juries may well be manifesting general community resentment by imposing liability when given the opportunity," Marc Franklin has recently noted.⁵ Accordingly, regardless of where the Supreme Court may set the nominal standard of liability, some juries may be quite willing to find it met. The *National Enquirer*, *Penthouse*, and *Hustler* have good reason to beware. In his own separate review of recent developments, Rodney Smolla sums up the news in the very title of his article—*Let the Author Beware: The Rejuvenation of the American Law of Libel*.⁶ Additional to the point Franklin and others have made quite forcefully,⁷ Professor Smolla suggests that libel juries are beginning to reflect a general shift of

Bose Corp. v. Consumers Union of United States, 104 S. Ct. 1949 (1984); *Herbert v. Lando*, 441 U.S. 153 (1979). Proof of negligence may suffice for some plaintiffs, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and strict liability may suffice if the defendant is not a member of the media and the plaintiff is a nonpublic figure, see, e.g., *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980), reviewed in Comment, *The Nonmedia Figure and Strict Liability in California*, 18 U.S.F.L. Rev. 253 (1984). See also *id.* at 260-61 nn.54-57. Several authors have urged that the "recklessness" standard should be the minimum. See, e.g., Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811, 821; Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 79-80, 91 (1983); see also Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976). For a general and excellent guide through the complexities of defamation cases, see Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1450-51 (1975).

5. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1, 10 (1983).

6. 132 U. PA. L. REV. 1 (1983).

7. See, e.g., Goodale, *Centuries of Libel Erased by Times-Sullivan*, 191 N.Y.L.J. 49 (1984); reprinted in *NEW YORK TIMES v. SULLIVAN, THE NEXT TWENTY YEARS* 528 (R. Winfield ed. 1984); Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603 (1983); see also Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times Co. v. Sullivan*, 25 ST. LOUIS U.L.J. 501 (1981). For a general bibliography of recent articles reviewing defamation law and the first amendment, see *NEW YORK TIMES v. SULLIVAN, THE NEXT TWENTY YEARS* 749-51 (R. Winfield ed. 1984).

attitude already widely encouraged in the legal order. A new conventional wisdom, of products liability law, has registered its own impact with juries who, consciously or not, are carrying it into libel cases regardless of the presiding judge's admonitions. Newspapers, sold just as other products are sold, will occasionally malfunction despite the manufacturer's—or rather, the publisher's—best precautions. Because a certain number of false statements and injuries are thus inevitable, even if commercial publishers are not reckless, the common sense of justice is to require the producer to internalize the cost of such libel mishaps by acting as an insurer of the damage his competitive publication yields—he can do so by reflecting it in the price of his publication. That sense of the just price, as well as an understandable sympathy for an attractive grieving plaintiff, makes the likelihood of successful libel actions altogether predictable.

Similarly, writing in the *New York Law Journal*, James Goodale concludes that “[j]uries in all forms of tort litigation are finding for individual plaintiffs with less attention to the arguments of corporate defendants and greater inclination to award staggering damages than ever before.”⁸ And to the extent this may be true then, again, further judicial tinkering with different or more rigorous scienter standards as a prerequisite to reaching the jury may not be very useful.

To be sure, in its most recent decision on this question of jury discretion, the Supreme Court itself has reflected a keen awareness of these concerns and, in *Bose Corp. v. Consumers Union of United States*,⁹ it has responded very firmly: trial and appellate judges may not simply offer drily correct instructions and leave to juries the resolution of a constitutional fact, such as scienter in a libel case, by the usual standard of just some evidence. Precisely for the same reason that explained several of the most famous Holmes-Brandeis dissents in the 1920's¹⁰—an awareness that juries may tend to find whatever they are told is necessary for them to find if they thoroughly dislike the publisher, his publication, his

8. Goodale, *supra* note 7.

9. 104 S. Ct. 1949 (1984).

10. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919).

general practices, or his business—the judge must operate as a special first amendment gatekeeper. The *Bose* decision may have an important tonic effect, therefore, and help screen some of the cases that have recently caused particular apprehension that the scienter standards worked out since *New York Times Co. v. Sullivan* have not been very satisfactory.

The fact remains, however, that twenty years of *New York Times Co. v. Sullivan* has not resettled the law of libel as one might have thought it would. Moreover, the Court's own repeated tinkering with variable scienter standards, as one means of working out a fair adjustment between damaged plaintiffs and apprehensive publishers, is now too complicated and virtually exhausted. Indeed, its own complexity may contribute to the anxiety of publishers in two respects. First, the sheer impracticality of general publishers taking this variable standard seriously,¹¹ given its own marginal ambiguities—for example, public figure, limited public figure, private figure, media defendant, and nonmedia defendant—must itself operate to inhibit some useful reporting that the theory of those refined standards did not mean to inhibit. Second, the very fact that plaintiffs are constitutionally obliged to prepare more professionally that aspect of their discovery and proof directed to the recklessness of the publisher's conduct, simply as a condition of securing any relief, may have had as one effect the more routine demand and award of punitive damages as well—the unpredictable size of which almost certainly terrifies editors the most.

In this latter respect, the grim irony of the situation may be similar to what appears to have happened in the modern death penalty cases. There, twelve years ago in *Furman v. Georgia*,¹² the Supreme Court for the first time interpreted the eighth amendment and the due process clause to require that legislatures stipulate identifiable aggravating circumstances, the presence of which the prosecutor would need to emphasize to make a suitable case for the penalty of death. But by requiring the prosecutor to emphasize

11. *See supra* note 4.

12. 408 U.S. 238 (1972). *See also* *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

such matters,¹³ and by encouraging a new professionalism in prosecutions in taking the penalty phase more seriously and in preparing for it more assiduously, the net effect may have been in part to increase the frequency of death sentencing, rather than to diminish it.

Emphasizing the need to prove aggravating circumstances as a constitutional requisite for the death penalty is much the same as emphasizing the need to prove the publisher's actual malice as a constitutional requisite in libel cases. Each is inadvertently well calculated to encourage the decisionmaker to treat the issue more consequentially than when it was not the focus of such elaborate preparation and presentation—that is, than when the Constitution itself did not direct attention to it. Indeed, one might well imagine in modern libel cases that a juror might suppose that if recklessness must be proved and if recklessness also entitles the defendant to consideration of punitive damages,¹⁴ then absent some exceptional reasons, the juror ought assuredly and quite routinely award punitive damages—just as one may suppose, albeit ruefully, that capital jurors instructed that there must be at least one aggravating circumstance to warrant death may then feel strengthened in their obligation to impose the death penalty when the prosecutor shows them that such a circumstance was present.

It would be too harsh to suppose that the Court's own purpose in focusing the prosecution's professional attention on proof of aggravating circumstances was all along meant to promote the high number of death penalty sentences now imposed; but it is not clear that what the Court has done has in fact saved very many from death row. Similarly, by demanding better preparation by libel plaintiffs in order to get to the jury at all, the Court may not have meant to encourage the higher damage yields that do seem much more menacing these days; but it is not clear that the Court's tinkering with the scienter standards has helped publishers in any significant fashion—other than occasionally to let them deny any redress to plaintiffs who lack evidence of the requisite scienter and

13. See *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) ("While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one [of 10 statutory aggravating circumstances beyond a reasonable doubt] before it may impose a penalty of death.").

14. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

who lack the means to pay to discover that evidence.

Professor Anderson understands all of this quite well. It is doubtless because he does so that he urges us to turn our attention away from further fiddling with scienter, and concentrate more on the issue of damages. I think he is right to do so, despite the lingering debate on scienter. Short of the Court's willingness to approve Anthony Lewis's insistence that absolute immunity should apply at least for published criticism of the official conduct of public officials,¹⁵ as Black and Douglas urged in *New York Times Co. v. Sullivan* itself,¹⁶ not much headway can be expected in that direction. And respectfully, I do not expect the courts to establish any such absolute immunity for the press. It is not realistic to suppose that the Court will now interpret the first amendment to immunize a newspaper that knowingly falsifies stories of officials to discredit and drive them from office, or a newspaper that attempts to persuade the electorate to vote against certain candidates at election time by deliberately publishing false stories fatally damaging to them on election eve. To the extent that the Court has already held that no newspaper need accept any reply from a public figure whom it discredits,¹⁷ and that no state may forbid publication of partisan political editorials on the eve of elections,¹⁸ some way of evening the odds must surely be left open—through the possibility of at least some sort of defamation action.¹⁹

We turn, then, to "the Anderson solution" and its several sensible suggestions for gaining control over the abuse of damages. I will have several comments meant mainly to support Professor Anderson's proposals, suggesting how they might be given constitutional foundations. Afterwards, I shall say why, nonetheless, an intrepid and resourceful tort plaintiffs' bar may even now be finding

15. Lewis, *supra* note 7.

16. 376 U.S. at 293.

17. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

18. See *Mills v. Alabama*, 384 U.S. 214 (1966).

19. And, either as an incident of that action or in lieu of that action, require a published retraction plus reimbursement of reasonable attorneys' fees upon proving the falsehood of the objectionable statements. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258. This sort of less threatening remedy is further developed in Franklin, *supra* note 5, and in Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1739-47 (1967). For an additional, well-argued moderate defense of defamation remedies, see Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979).

new ways around these proposals and why we are very far from finding a suitable repose even a generation after *New York Times Co. v. Sullivan*. At the end, I shall enter a mild plea to step back from the bewildering technical detail of these specialized tort areas and suggest that we need to look for a smaller number of more manageable principles to gain some renewed confidence in this field.

II. CONSTITUTIONAL GROUNDS FOR "THE ANDERSON SOLUTION"

David Anderson's proposals appear to be straightforward and attractive. He notes first that to the extent local juries may be hostile to certain publishers, they currently find opportunities for harassment in the invited outlet of their power to say just how badly the plaintiff was harmed and, accordingly, just how much the publisher should be mulcted. Two customary doctrines currently permit considerable jury discretion in the matters. Each, therefore, should be revised by appropriate judicial intervention.

The first of these is the presumed harm doctrine, which Professor Anderson would eliminate outright.²⁰ If the cause of action is stated to be one meant to redress harm to damaged reputation—that is, defamation—then Professor Anderson suggests that it is merely reasonable for the plaintiff to produce specific evidence in every case respecting the extent to which his reputation has in fact been damaged. That evidence, in turn, provides a suitable benchmark for the judge to determine whether the jury has responded to the evidence rather than seized upon the occasion to express its ire against the publisher. Assumptions of damage, regardless of the nature of the alleged misstatement by the publisher, must not suffice. Jury conjecture on the question of likely harm, absent credible supporting evidence of actual harm, is inimical to adequate first amendment protection. The presumed harm doctrine, despite some sense it may have made because certain types of false, generally circulated statements are presumptively likely to lower one's reputation and because it is sometimes demeaning as well as awkward and downright difficult to require the plaintiff to produce witnesses to say that the publication has

20. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 749 (1984).

caused them to regard the plaintiff in a new and highly unfavorable light, provide too easy a license for plaintiffs and juries.

Second, varieties of actual harm additional to damaged reputation, such as the plaintiff's own humiliation and genuine anguish, may be shown, but only after evidence of actual harm to reputation.²¹ If the cause of action is stated to be one arising in response to damaged reputation, then only if the plaintiff can first show *that* species of harm—reputational harm—may he or she address the appropriateness of additional redress. The suggestion is meant to answer such cases as *Time, Inc. v. Firestone*,²² to prevent plaintiffs from proceeding at once to mental anguish damages by abandoning any claim for harm to reputation, which in fact may not have been affected at all. The suggestion also has a strong *a priori* logic to it. It is that producing evidence of harm to reputation in a defamation action as a prerequisite to showing harm to other compensable interests as well, does no more than requiring that one who produces a play called "Hamlet" will not expect an audience to be assembled for his benefit if he really means to forget the Prince himself and rely simply on the entertainment value of the incidental cast. Both of Professor Anderson's proposals are well developed in his article, of course, and here I have done no more than to reiterate them in order to comment upon them.

One cannot determine from his article, however, whether his proposals are meant to be offered merely in the spirit of an American Law Institute proposal as a commendable common law development for better-minded judges to adopt,²³ or whether he thinks adoption might also be fitted tightly enough within conventional first amendment doctrine to force the change a bit. It was not in-

21. See *id.* at 758.

22. 424 U.S. 448 (1976). For a discussion of *Firestone*, see Anderson, *supra* note 20, at 757.

23. Despite *Gertz*, for instance, some state supreme courts have been persuaded to disallow punitive damages in defamation actions. See, e.g., *Stone v. Essex County Newspapers*, 367 Mass. 498, 330 N.E.2d 161 (1975); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979). In addition, state constitutional free speech and free press clauses provide an attractive basis for state supreme court movement. See Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984). Justice Stevens has strongly endorsed Hans Linde's insistence that state courts must first examine a claim under state constitutional law to determine whether it should succeed on that ground alone. See *Massachusetts v. Upton*, 104 S. Ct. 2085, 2089-91 (1984) (Stevens, J., concurring).

cumbent on Professor Anderson to argue the latter point, of course, and certainly his proposals may be just as good if made to be persuasive by their merit, rather than contrived as first amendment imperatives. Still, to the extent that some first amendment material may happen to coincide with these ideas, the coincidence may itself be helpful. Indeed, to the extent that one sees the current problem partly in terms of localized judicial distaste for certain publishers, rather than exclusively jury problems, some friendly fortification from the first amendment may be more than merely helpful—because the likelihood that change may otherwise occur through the general state judiciaries may be quite inverse to the need. It may be useful to show in some measure, therefore, how parts of the Anderson solution can be given some useful constitutional support before turning back to some problems it may also leave unresolved. A good basis for such support requires but a paragraph.

Even before *New York Times Co. v. Sullivan*, it was well established that the extent to which—and not merely the excuse for which—the state could impose upon one's speech or publication was subject to first amendment limitations. Judge Learned Hand's general formula, adopted by the Supreme Court in *Dennis v. United States*,²⁴ reflects the point quite sensibly: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies *such* invasion of free speech as is necessary to avoid the danger." Adapted and applied in the libel context, the question is the same: whether the degree of damage actually sustained justifies such invasion of speech as is necessarily reflected in the amount of damages the defendant shall be required to pay. Any larger sum over-redresses the injury which alone sustained the libel action itself against a first amendment objection. If, then, the justification for the cost levied on freedom of publication is the compelling need to provide redress for reputational injury, including any accompanying actual harms, then necessarily at least by a preponderance of evidence—and arguably by evidence that is clear and convincing—the plaintiff must prove the actual extent of harm that the money payment suitably redresses. What demands it? The first amendment demands it. Why? Because the

24. 341 U.S. 494, 510 (1951) (quoting 183 F.2d 201, 212 (2d Cir. 1950)) (emphasis added).

first amendment forbids the state from imposing any inessential cost on freedom of the press.

The point is picked up earlier, in the famous dissent by Justice Holmes, in *Abrams v. United States*.²⁵ Dissenting on several grounds, Holmes also dissented in that case because he was satisfied from the record that the degree of punishment actually imposed was an inessential cost on the defendant's freedom of speech in that the punishment grimly exceeded the record evidence of the extent of his misconduct. So, Holmes declared:

Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow. . . .²⁶

In this respect, the Hand and Holmes formulations are virtually the same. One emphasizes that only "such invasion" as sufficient justification has established to be warranted can be allowed. The other emphasizes that, where nothing more than a technical violation was established by the evidence, only the "most nominal punishment" can be imposed. Correspondingly, a rule of "actual harm shown," not exceeded by the damages actually awarded, seems soundly grounded in conservative first amendment orthodoxy.

Related decisions by the Supreme Court may also be brought to bear to keep the burden of proof, respecting the extent of injury to be compensated, at all times on the plaintiff—and not allow its subtle shifting over to the defendant, as in presumed harm rules pursuant to which significant, albeit uncertain, harm will be inferred unless the defendant comes forward to show in the circumstances that such harm was nonexistent. The anticipation of having to rebut a presumption of harm in the event one publishes a particular statement, as imposing too great an inhibition upon free speech, was recognized in *New York Times Co. v. Sullivan* itself in requiring, as it did, that the plaintiff establish the falsehood of the

25. 250 U.S. 616 (1919).

26. *Id.* at 629 (Holmes, J., dissenting).

damaging utterance rather than reserving proof of its truth as an affirmative defense.²⁷ Forbidding the relocation of burdens to defendants in first amendment cases had been rightly foreshadowed by the Court six years earlier, in *Speiser v. Randall*.²⁸ There is, then, solid grounding for these portions of the Anderson solution in preexisting, established first amendment law.

On the other hand, the treatment of punitive damages was not as clearly addressed in Professor Anderson's article. Perhaps we were meant to infer that such damages must be disallowed²⁹ categorically because, by definition, they are in excess of any actual harm the plaintiff will have shown he or she actually sustained, whether to reputation itself or, additionally, as an accompanying harm of humiliation and anguish. Still, the matter is not clear. Might the outcome depend upon what one assumes respecting the degree of scienter or mens rea the plaintiff succeeds in proving, that is, the degree of knowing falsehood or even malice in a layman's sense—deliberate falsehood published for spiteful reasons alone? If the plaintiff first met the Anderson requirement of showing actual harm to reputation, and additionally could show evidence of appropriate scienter as well—currently, mere recklessness will do³⁰—should the plaintiff then be able to add on punitive damages?

In terms of what has drawn us to this Symposium, this issue is assuredly much too significant to go unaddressed. Indeed, as one looks to the more worrisome judgments, perhaps it is the largest part of the press's legitimate complaint. The last half dozen cases I have read typically returned compensatory damages in fairly manageable amounts, but punitive damages in the hundreds of

27. See 376 U.S. 254, 278-80 (1964).

28. 357 U.S. 513 (1958).

29. As at least two state supreme courts have so held. See *Stone v. Essex County Newspapers*, 367 Mass. 498, 330 N.E.2d 161 (1975); *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979); see also Franklin, *supra* note 5, at 39 ("I would abolish punitive damages in libel cases"); P. Freund, Remarks to the Twenty-ninth Annual Judicial Conference of the Third Judicial Circuit of the United States (Sept. 8, 1966), reprinted in 42 F.R.D. 437, 497-98 (1966); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1252-53 (1976); Smolla *supra* note 3, at 92, 93 ("punitive damages should be abolished in defamation cases").

30. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); see also *Bose Corp. v. Consumers Union of United States*, 104 S. Ct. 1949 (1984).

thousands, and even millions, of dollars.³¹ Since the plaintiff's attorney's fee is ordinarily taken from the plaintiff's recovery, it is unlikely that the average damage recovery for presumed actual harm is in fact providing very many plaintiffs with any significant windfalls. Indeed, if a fair part of merely compensating the plaintiff for presumed actual harm should appropriately include the transactional recovery costs the plaintiff must absorb, and which the plaintiff does absorb by paying his or her attorney from the judgment awarded, it is also unlikely that actual damage awards are currently excessively mulcting defamation defendants for the harm they may actually be shown to have done. But none of this need be true of punitive damage awards, which tend to be quite spectacular. For all but the largest publishers, then, one must worry that just one or two libel suits, unsatisfactorily resolved even through the appellate courts, may be devastating.

The discussions of this issue are currently unsatisfactory. The Court has indicated that punitive damages are recoverable upon the requisite proof of mere recklessness.³² But this may mean, as I conjectured in the introduction, that punitive damages are even more commonly awarded now than in the past. The manner of policing enormous awards is currently mostly by mere remittitur. Thus, if the appellate judges believe that the conduct of the publisher could not possibly warrant the exorbitant sum awarded by the jury, they grant a new trial on the whole case unless the plaintiff agrees to accept a smaller—but usually still very substantial—sum.

Because my own remarks are meant to be but a Comment on

31. See generally Franklin, *supra* note 5; Smolla, *supra* note 4. On the other hand, Marc Franklin also notes:

[M]edia defendants were successful in almost seventy-five percent of their efforts to have cases dismissed before trial.

. . . Trial judges grant judgments [for defendants] notwithstanding the verdict in twenty percent of these cases. . . .

Defendants appeal from virtually all adverse judgments. In these appeals, the plaintiff loses his judgment two-thirds of the time. In all, plaintiffs who sue media defendants ultimately get and keep judgments in five to ten percent of all libel cases, and most obtain relatively small dollar awards. Even adding in settlements, this may be the most dismal performance record for plaintiffs in all areas of tort law.

Franklin, *supra* note 5, at 4-5 (footnotes omitted).

32. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Professor Anderson's article, I feel excused from trying to offer very much on this particular subject. I am frankly grateful for the excuse, moreover, because the subject is too hard. Still, with no confidence that these suggestions will necessarily carry very far, I should try at least to sketch some first amendment related possibilities.

First, despite the Supreme Court's current acquiescence in regard to punitive damage awards when mere recklessness is proved, a fair case can be made to eliminate such damages outright from civil defamation actions.³³ Remember that, consistent with the Anderson solution, the plaintiff can already recover for all actual harm. If all actual harm is provided for, then, including as actual harm all reasonable and unavoidable transaction costs, what more deserves to be considered in this purely civil case? That the defendant acted badly, even very badly? But recall that lots of speakers and many publishers act "badly," that is, from motives that we all agree are base or ignoble; when no harm is done, nor any even imminently threatened, in general the free speech clause is regarded as requiring that we leave them alone despite their ignoble motives.³⁴

"Bad" motives for true statements otherwise protected by the first amendment and neither inflicting nor imminently threatening serious harm cannot be used to strip away one's freedom to speak or to publish. Why, then, treat the matter differently even when actual harm does result from false statements—if the action already fully allows adequate relief?³⁵ To be sure, such punitive damages are permitted and are commonplace elsewhere in the law of torts. But those other torts are not bounded by the first amendment as defamation is, and correspondingly it would not be anomalous if punitive damages were flatly disallowed in this area even while not being disallowed in other areas.

Alternatively, to the extent that the reprehensible nature of the defendant's conduct is felt sufficient to trigger the public interest

33. See *supra* note 29.

34. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Comment, *Brandenburg v. Ohio: A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151 (1975).

35. Cf. *Keeton v. Hustler Magazine*, 104 S. Ct. 1473, 1479 (1984) ("New Hampshire has clearly expressed its interest in protecting such persons from libel, as well as in safeguarding its populace from falsehoods.").

in punishment per se, at least when his false statements did break out in actual harm—in this instance, actual harm to a plaintiff's reputation—given the strong first amendment overtones a strong argument may still be made that something more than the mere current recklessness scienter standard ought to be proved—that at least the published utterance was known by the publisher to be false and published despite that knowledge.

Even more, insofar as these are meant to be “punishment” damages—that is, damages in vindication of general public interests transcending the particular civil plaintiff's interests, they are to this extent more appropriately assimilated to a style of constitutional analysis the first amendment may impose upon criminal prosecutions rather than mere private, civil claims. From that perspective, one might even argue that the requisite scienter the plaintiff must establish in order to trigger any recovery for purely punitive damages should be proved by a standard of evidence suitable for the criminal law, namely, proof beyond reasonable doubt and not merely proof by a mere preponderance or by clear and convincing evidence.

These several possibilities doubtless feel somewhat strained, as I think they are, too. But given the extent to which the Supreme Court itself has imported so many complications into libel law already under claim of first amendment necessity, it is not clear that these additions would constitute any departure in kind. Recall that we already have different levels of scienter that must be proved depending upon the plaintiff's status, the defendant's status, and the nature of the media.³⁶ Recall also that we already have different standards of evidence that must be satisfied, depending upon such matters also.³⁷ Nothing in these additional notions are novel any longer.

Indeed, a plausible argument might well be made that insofar as “punishment” damages are to be imposed for defamation, then they must be imposed pursuant only to a due process proceeding ordinarily required by the Constitution for criminal law, rather

36. See *supra* note 4.

37. For example, a standard of “clear and convincing proof” of reckless falsehood by the publisher is required if the plaintiff is a public figure or one who holds governmental office. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 342 (1974).

than continued as an incidental part—but frequently as the actual central feature—of a private civil tort dispute. In brief, the first amendment may be construed as requiring the procedural safeguards of a criminal libel trial, when it is essentially criminal law purposes, such as punishment, deterrence, and retribution, that are being pursued in any case directly involving speech or press.³⁸

Still, rather than move to these very vexing notions, it may be better to discontinue punitive damages in civil libel cases completely. If the Supreme Court cannot find its way to do so on first amendment grounds, then as has already happened in several states, perhaps state courts may do so on grounds of policy or state constitutional law.³⁹

Even assuming that suitable grounds exist for punitive damages in at least some instances—for example, when damaging falsehoods are published knowingly and for reasons of sheer profiteering on personal ill will—the current treatment is highly unsatisfactory. What we currently see in certain cases are occasional jury awards in such exorbitant amounts that—just as Holmes noted in the excessive sentence imposed in the *Abrams* case—the jury presumably has sought to punish the defendant for the general character of his publication, rather than for any particular misconduct justifying such horrendous awards. In turn, some fraction of the exorbitant award is then reduced by the trial judge or on appeal by remittitur, pursuant to which a new trial is ordered unless the plaintiff accepts the lesser, but still typically substantial, award the judges deem suitable. To the extent that the passion and prejudice of the jury reflects an antagonism to the defendant's publication or general publications practices, however, I believe libel defense attorneys are entitled to a new trial regardless of the plaintiff's willingness to accept the lesser award that the court thinks appropriate. The reason is the same one that Justice Holmes provided in voting to reverse *Abrams's* conviction outright, rather than simply to object to the uncertain extent to which *Abrams's* twenty-year sentence may itself have been excessive. Insofar as the record re-

38. Compare *Gertz*, 418 U.S. at 348-350, with *Garrison v. Louisiana*, 379 U.S. 64 (1964) (prosecution for criminal libel); and *In re Winship*, 397 U.S. 359 (1970) (proof beyond reasonable doubt required by due process in criminal cases).

39. See *supra* notes 23 & 29. The elimination of punitive damages in defamation cases by the Oregon Supreme Court was on the basis of its interpretation of the state constitution.

flects an intention to treat the defendant badly "not for what the indictment alleges but for the creed" he avows,⁴⁰ it reflects not merely a consideration that is improper as such, but a consideration disallowed by the first amendment itself. There is typically no way of determining the extent to which that taint equally affected the jury's determination of all the other contested issues in the same case, and not merely the determination of appropriate damages, however, and thus the proper corrective must be to reverse the entire outcome. Remittitur is thus almost always an insufficient response. Indeed, the chilling effect on publishers who have reason to be apprehensive of being caught by the jury, policed only by the discretion of judges to reduce damages in such measure as the judges then think appropriate, is still intolerable. For all that one can know, the judges may themselves still sustain very sizeable punitive damage awards reflecting in part their own understandable, but constitutionally improper, distaste for the defendant's publication.

In neighboring areas of constitutional law, the appellate courts have not presumed to disaggregate the degree to which an anti-first amendment decision played a fatal role. Rather, once it is determined that prohibited considerations played any significant role, unless the other party can establish that the result would have been the same in the absence of such a taint, the court reverses. First amendment cases involving public employees furnish a familiar example. If the plaintiff shows he was fired in significant part because of first amendment protected activity, then he will receive complete relief unless the government can show that even had there been no consideration of that activity the plaintiff would nonetheless have been dismissed.⁴¹ In the usual libel case, it will virtually never be possible to separate the alleged harmlessness of the error because the judge cannot determine the amount of damages or the outcome of any contested issue respecting liability itself that would have been certain even had the jury not taken improper considerations into account. Rather, all the judge may know is that given the magnitude of punitive damages, the judgment, as in *Abrams*, is inexplicable other than as a probable reflec-

40. *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

41. See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

tion of the jury's disapproval of the publisher or his publication. In all cases where the excessive punitive damages thus appear to bear no fair correspondence to the outrage of the particular libel, but do suggest a close correspondence to the mere disreputability or felt social mischief of the publication, the better first amendment result is to reverse the entire case.

III. CIRCUMVENTING "THE ANDERSON SOLUTION"

David Anderson's proposals are carefully framed and very well defended. Up to this point, I have tried merely to suggest some few additional ways in which they may also be constitutionally fortified. Still, it is true of his proposals and of my own comments that they are limited to defamation in particular, which may leave out of account too many things. The characteristic carefulness with which Professor Anderson has presented his arguments doubtless strengthens the persuasiveness of those arguments. At the same time, however, the same quality also limits them so precisely to defamation alone as to expose nearly all of them to circumvention by an imaginative and resourceful tort plaintiffs' bar. It is to that possibility I now turn briefly.

To a considerable extent, the persuasiveness of the Anderson thesis is a function of the particular subject itself. We can see that this is so simply by quoting his own very careful statement: "[My] thesis . . . is that compensating individuals for actual harm to reputation is the only legitimate purpose of defamation law today."⁴² In the body of his paper, the developmental emphasis is then upon establishing that actual harm to reputation, and upon the logic of requiring that sort of actual harm to reputation to be proved before additional varieties of connected injuries may also be redressed in the same defamation action—for example, the personal humiliation and anguish one may endure additional to diminished reputation. Here, however, I want to quote him again without changing a single word but with a different emphasis added: "[My] thesis . . . is that compensating individuals for actual harm to *reputation* is the only legitimate purpose of *defamation* law today." Thus, his emphasis is actually upon making the case for requiring

42. Anderson, *supra* note 20, at 749.

specific evidence of actual harm to reputation if but only if the cause of action is one for defamation. If the plaintiff complains of "defamation," surely he or she must be prepared to show how his or her fame has been actually harmed in order to recover anything entitled to be regarded as responsive to the plaintiff's own self-stated grievance. Similarly, when the plaintiff's only self-stated grievance is one for defamation, then such associated injuries the plaintiff also wants redressed with money damages are necessarily parasitic on the defamation and cannot be pursued if the plaintiff abandons the host—that is, the claim of actual harm to repute.

All of this, I say, I find wholly logical and persuasive. But aside from the important material Professor Anderson also provides on how actual harm shall be proved, and in what it shall consist, I think it persuasive virtually by definition alone. The thesis applies compellingly when the action is for defamation—but what if the plaintiff does not so designate it? By renaming the action, by relocating it under a different convenient rubric, or by simply adding to the defamation claim a separate claim for differently named claims, may not the plaintiff evade at least a great deal of the Anderson solution? By renaming the tort, the plaintiff no longer need demonstrate reputational injury either actually or prerequisites to proving other kinds of actual harm—because he no longer is complaining about libel or slander, but about another tort entirely.

Of course, this point might be trivial if it meant merely that Professor Anderson's Article does not go to first amendment damage questions that may arise under wholly distant categories of the law, such as breach of contract or statutory claims. The point may not be trivial, however, for the nuances newly available in torts, scarcely different from defamation but technically not the same as defamation, in fact make the possibilities for plaintiffs quite startling. They also make these possibilities newly threatening to the press. Here are some fairly obvious ones, each providing some escape from the Anderson solution.

The plaintiff may call his tort a "false-light privacy" claim.⁴³ If the description fits, the plaintiff need not claim, and thus need not show, that his reputation has suffered. Indeed, in a commercial

43. The principal Supreme Court review of this kind of case is still *Time, Inc. v. Hill*, 385 U.S. 374 (1967). See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

sense, the plaintiff's reputation may even have been enhanced. Nonetheless, the grievance is that the plaintiff has been falsely represented and in a manner personally humiliating or embarrassing or inconsistent with the way he or she really is and wants to be perceived. If the plaintiff can show that the misleading portrayal was made recklessly, although not reputation-damaging, significant damages may be forthcoming. False light is one of the four privacy "rights."⁴⁴ Almost all of the recent cases combine the libel action with the false-light privacy action.⁴⁵ This combination probably occurs because the plaintiff's attorney does not anticipate being able to prove any injury to reputation as such. By redesignating the injury as one to privacy, the plaintiff makes clear what he is seeking. The basic problem that this redesignation presents is an ancient one: what restrictions, if any, does the first amendment impose on the power of state government to protect this different kind of interest, whatever it may be called? What limits shall the courts impose, for instance, on the action called "false-light privacy"?⁴⁶

If the action is not false-light privacy, it might be "embarrassing-facts privacy." In an embarrassing-facts action, the published matter is true, but extremely embarrassing. The plaintiff does not

44. For an excellent, current review of cases and materials, including the Prosser and *Restatement* formulations, on these and related torts, see R. EPSTEIN, C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 1225-94 (1983), and G. CHRISTIE, *CASES AND MATERIALS ON THE LAW OF TORTS* 1034-93 (1983). See also Wade, *The Tort Liability of Investigative Reporters*, 37 VAND. L. REV. 301 (1984).

45. See, e.g., *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983).

46. Note, for instance, the understandable caveat in the RESTATEMENT (SECOND) OF TORTS § 652E (1976):

The Institute takes no position on whether there are any circumstances under which recovery can be obtained under this Section if the actor did not know of or act with reckless disregard as to the falsity of the matter publicized and the false light in which the other would be placed but was negligent in regard to these matters.

See also *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984). *Braun* upheld an award of \$15,000 in actual damages and \$50,000 in punitive damages for a false light privacy invasion of the plaintiff, a novelty entertainer who performed an act with a swimming pig at a commercial amusement park. The plaintiff was deemed not to be a public figure, despite the fact that the photograph was itself a publicity photo of the act showing her in a swimming pool with "Ralph, the Diving Pig." As to the "false light," it consisted solely of the magazine in which the photograph was used. The court accepted the plaintiff's argument that the jury was entitled to find "that the ordinary reader automatically will form an unfavorable opinion about the character of a woman whose picture appears in *Chic* magazine." *Id.* at 254.

think that the publisher had a sufficient social justification for bringing these details to the voyeuristic attention of his fellow citizens.⁴⁷ May the state not compensate the plaintiff for his embarrassment to the extent that a publisher, without sufficient political or social justification, presumes to market his trashy journal by pandering to the public's voyeuristic interest in the details of the plaintiff's wretched life?

If the facts for that case are lacking, the plaintiff might be able to bring a "right of publicity" case.⁴⁸ The right of publicity is a property right.⁴⁹ Again, I mention this cause of action to show the ingenuity of our mutating, pro-plaintiff tort law in skirting the Anderson solution. A recent California case on this subject amply demonstrates how tort law may avoid the Anderson solution by showing that the lack of actual harm to reputation may have little or nothing to do with the success of a claim. This is the case of *Eastwood v. Superior Court*.⁵⁰

Clint Eastwood filed suit against the *National Enquirer*, claiming approximately that the *National Enquirer* used a photograph of him they accurately reproduced on the front page, advertising an inside story that would inform the purchaser of the newspaper about the romantic entanglements of Clint Eastwood. And, surely enough, on the inside page there is a semi-sensational story about Mr. Eastwood. He alleges that some of the story is false, as a matter of fact, and he has sued therefore partly in libel. He has sued also under false-light privacy for reasons I have tried already to share with you—that to some extent the story is false, but not nec-

47. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975):

Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellow men? In our view it does not. . . .

If the public has no right to know, can it yet be said that the press has a constitutional right to inquire and to inform? In our view it cannot.

See also *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34 (1971); RESTATEMENT (SECOND) OF TORTS § 652D (1976).

48. See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); see also R. EPSTEIN, C. GREGORY & H. KALVEN, *supra* note 44, at 1213-52.

49. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); see also *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) ("It is our view that, under the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes.").

50. 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983).

essarily reputation damaging. The story does not write of him as being compromised or as committing a sexual crime, but just pursuing a lifestyle, which, indeed, from the box-office point of view, is probably not reputation-damaging—it may even be, ironically, enhancing—but from Clint Eastwood's point of view, nonetheless, inaccurately portrays him. That's the false-light privacy.

But the third branch of Eastwood's complaint goes further. Evidently it alleges that some of the romantic descriptions were not only false, but that they were known to be false and that the writer may have made them up because he thought they would be more attractive to the consumers who buy the *National Enquirer*. Now, to be sure, these fictions may not damage Mr. Eastwood's reputation but, again, that is not the point. Rather, the claim is that his picture was featured on the cover for the purpose of selling the *Enquirer* to audiences, which the paper then sells to merchants for advertising revenue. In short, the *Enquirer* commercially exploited Clint Eastwood in order to sell its product—that is, their paper. The legal theory is that this is enough like the old cases involving a company that might take a picture of Cary Grant and have him stand next to a big package of Camel cigarettes as though he were endorsing them. That is the origin of this, is it not—the right of publicity, the property right in one's name to control it as a market commodity? It is a very good theory, as a matter of fact. Notice it has nothing to do with reputation as such, just as it has nothing to do with emotional anguish. The question before the jury, then, is presented principally on the theory of unjust enrichment.⁵¹ How much money should the *National Enquirer* pay to Clint Eastwood for having misappropriated the contractual, bargainable value that he might demand if the first amendment will tolerate a theory of private property to exploit his name for the interest of commercial fictions? It is a very straightforward theory. It is totally unaffected by Professor Anderson's address. It is also present in a substantial number of potential "celebrity" cases.

And now, let me turn the corner, finally, on the darker side that

51. The appellate court's discussion of the commercial appropriation claim is located at *id.* at ____, 198 Cal. Rptr. at 347-521. Approval of recovery according to the benefit to the publisher, rather than the loss to the plaintiff, is recorded at *id.* at ____, 198 Cal. Rptr. at 352 n.10.

brings us up to date with the observations about the Supreme Court's most recent opinion.⁵² I imagine that in some jurisdictions, a class action may also be brought by the purchasers of the *National Enquirer*. It may be one for breach of warranty, and it may be one for fraud. It may also carry with it punitive damages. What is the theory? It is very straightforward. The paper represents the stories to be true. If the paper had presented them as false stories of Clint Eastwood, which they do not, they allegedly would know they would not sell as many papers. The success of the paper is partly contingent upon the titillating capacity of the story insofar as the readers think these things really happened. These, then, are fraudulent goods. But doesn't the publisher impliedly warrant that these are true titillating stories? The buyer did not get what is represented implicitly in the merchandise.⁵³

It may be that any one suit by one consumer may, at best, entitle that buyer to a refund, but aggregate it as a class action in California, and we may be talking about millions of dollars. If, indeed, one can show there is this element of commercial fraud, one may open the door for punitive damages as well. I do not know why, in theory, that case is not sound. Finally, to come full circle, if you look at the publication as a product being marketed,⁵⁴ as a matter of fact, I do not know why one might not replace a standard of recklessness with a standard of mere negligence or even of strict liability. Let the cost of the product reflect the degree of insurance necessarily built in to what the publisher is made to guarantee—the truthfulness of his representation. The jury may not be very interested in the actual degree of scienter.⁵⁵ Let the cost of the product reflect those individuated injuries. Thus we go round.

IV. RE-ESTABLISHING THE FIRST AMENDMENT

From these last few dour remarks, you may see why I think a

52. *Keeton v. Hustler Magazine*, 104 S. Ct. 1473 (1984) (first amendment requires nothing more than ordinary due process requirements to secure personal jurisdiction over publishers in defamation actions).

53. Consider, in this respect, the plaintiffs' possible use of § 2-314 and § 2-315 of the Uniform Commercial Code. See also Smolla, *supra* note 4.

54. *But see* *Spiritual Psychic Science Church of Truth v. City of Azusa*, ____ Cal. App. 3d ____, 201 Cal. Rptr. 852 (1984).

55. See Smolla, *supra* note 4, at 11, 22-26; *Franklin*, *supra* note 5, at 7.

somewhat stronger and more general address may be needed to the issues we have been examining. The density of defamation doctrine is itself already quite intimidating and still by no means satisfactory. It leaves some persons completely remediless even when provision for a strictly limited remedy, such as retraction alone, would probably be appropriate,⁵⁶ but in other respects it also leaves the press extremely vulnerable and exposed. In directing proposals solely to the technical distinctions of defamation, moreover, we may overlook the ease with which these proposals may be countered—as in the example of suing directly for the reckless infliction of emotional distress in order to sever it from libel so that it will not be merely parasitic on the libel action and thus compensable only if actual damage to reputation is first established, as the Anderson solution would require.⁵⁷ Indeed, as one proceeds to unpack the possibilities for still other kinds of claims and additional causes of action which refined suggestions too tightly tailored to libel actions leave unaffected, a great deal of leakage appears. Our mutual

56. See *supra* note 19.

57. In *Pring v. Penthouse Int'l*, 7 Media L. Rep. (BNA) 1101 (D. Wyo. 1981), *rev'd*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983), the jury awarded the plaintiff \$26.5 million, reduced by the trial judge to a mere \$14 million for a sexual parody of "Charlene," a made-up "Miss Wyoming." The appellate court concluded, "it is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else." 695 F.2d at 443. On that basis only, the defendant escaped the judgment for libel—that is, that no reasonable jury could believe that the particular parody represented a true statement of or about the plaintiff.

Had the plaintiff considered an alternative tort theory, now available in a number of jurisdictions, it is not clear that *Penthouse* would have escaped. For instance, because the "negligent infliction of emotional distress" surely includes "the reckless infliction of emotional distress," insofar as *Penthouse* borrowed certain true elements from Ms. Pring's life, *Penthouse* might obviously have expected publication of its parody to result in humiliation and embarrassment to Ms. Pring. Insofar as the manner in which it composed its fiction was gratuitous in imposing that risk of anguish and humiliation—that is, insofar as *Penthouse* composed its fictitious story in a manner recklessly calculated to inflict such emotional suffering and insofar as it might readily have composed an equally useful parody without such reckless disregard for Ms. Pring's feelings—it requires no leap at all for a different plaintiff's attorney readily to meet the shortcoming of the case itself. Note, then, that even supposing the *New York Times Co. v. Sullivan* standard of recklessness were read into this tort, as in libel for public figures, still it would have been met. In the actual case, moreover, the trial court had concluded that recklessness was not required because Ms. Pring was not a public figure under *Gertz*. The general problem of libel law and fiction has been recently reviewed in Note, *Toward a New Standard of Liability for Defamation in Fiction*, 58 N.Y.U.L. REV. 1115 (1984).

efforts to contain the law of defamation have themselves already become overgrown and yet even now seem insufficient. Since *New York Times Co. v. Sullivan*, the refinements of libel law have become bewilderingly complicated⁵⁸ as well as time consuming. In the meantime, nearby holes in the dike are opening. Our slight repairs are too narrowly conceived.

In certain respects, moreover, alternative claims may obviously threaten the press far more than libel actions because they are not subject to some stock defenses that limit libel actions. Proof of falsehood, for instance, is no requirement of an action seeking redress for an invasion of privacy.⁵⁹ Proof of recklessness is no part of products liability law. Even proof of harm itself is not required in a commercial appropriation case. Rather, the theory of the case may be that whatever makes one newsworthy belongs to us. Accordingly, it is we who must be able to say how and by whom our vendible persona shall be featured for profit.⁶⁰

And yet, and quite oppositely, unless what is published about us is deemed newsworthy in some special sense, a newspaper may even find itself liable precisely because the matter was not sufficiently newsworthy. Under one view of ordinary negligence law, if a plaintiff is injured by someone who read about her in a routine news story, for instance, some courts seem quite willing to hold the newspaper itself unless the publisher can explain why it presumed to publish a full report, rather than an abridged, self-censored, and incomplete report.⁶¹ The likelihood of such suits being successfully brought, moreover, may be greatest in what many regard as the most progressive states. These are those jurisdictions in which "ubi ius, ibi remedium" has been enlarged to "ubi injuria, ibi remedium."⁶² The movement of progressive societies in this view,

58. See, e.g., Eaton, *supra* note 4; see also *NEW YORK TIMES v. SULLIVAN, THE NEXT TWENTY YEARS* (R. Winfield ed. 1984).

59. See *supra* note 47.

60. See *supra* notes 48-51.

61. See, e.g., Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 103 S. Ct. 1233 (1983). For a review of Hyde, see Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from the Publication of Accurate Information*, 52 UMKC L. REV. 421 (1984); Note, *Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744 (1984).

62. Thus the once helpful, if somewhat tautological, maxim that "where there is a right, there is a remedy" has been extended to the view that "where there is an injury, there is a

to paraphrase Sir Henry Maine, has been a movement from rights to remedies. Accordingly, where the party who actually committed the harm is either insolvent or unavailable to answer, the natural temptation is to hold the next most proximately solvent party, in order that no injury go unredressed. It is, in this view, quite appropriate that the newspaper must be prepared to defend not just the truth but the legitimate newsworthiness of what it publishes, unless it is prepared to answer for all the adverse results.⁶³

Each tort, each claim, each new demand for full and merely equal press accountability, moreover, may state quite a plausible case when considered by itself, within its own framework. Each simply seeks a certain balancing of interests between each grieving plaintiff and the solvent newspaper or journal which the particular plaintiff's complaint seems to fit. Still in all, this seemingly admirable characteristic of our common law may also constitute some part of the problems we have.

The common law tradition struggles for detachment. It has no reason to weight the defending, solvent newspaper's interest as initially better than the needs of the grieving plaintiff. Indeed, to the extent that part of the common law tradition is, inexorably, to seek some means for redressing every harm not literally and solely self-inflicted, the subconscious weighting in these cases will be favorable to each plaintiff with any sort of colorable claim upon the resources of the defendant. All of this, however, tends literally to leave the first amendment out of account. It assumes that the first amendment is also neutral.

What is generally lacking in these cases, as it is lacking also in the Supreme Court in recent years, is a sufficiently strong and general view of the first amendment as might keep us from becoming "deconstitutionalized" in the formulae of the common law process. We are advised that the first amendment does restrict that process—*New York Times Co. v. Sullivan* itself makes clear that the

remedy," which may be quite a different thought. In some jurisdictions, it tends to mean that if an injury has been sustained but the person most immediately responsible is unavailable or insolvent, then in order that a remedy be provided a right will be found against the next most proximately solvent party. For an interesting review of the maxim "ubi ius, ibi remedium," see H. BROOM, A SELECTION OF LEGAL MAXIMS 120-29 (R. Kersley 10th ed. 1939).

63. See *supra* notes 47 & 61.

first amendment applies equally to the substantive common law of a state as it does to abridgments by formal legislative enactments⁶⁴—but increasingly the Supreme Court's own approach has drifted back to a virtual copying of the common law process alone. There is today, for instance, no general first amendment test at all. Rather, there are merely congeries of tests, each as the Court itself declares, without seeing the irony, "a law unto itself."⁶⁵ A random walk through any modern casebook in constitutional law will discover the extent to which the first amendment has been fragmented and scattered virtually out of sight by a miming of the common law process—of carefully sorting, weighing, and balancing each interest with professional detachment, with no particular predisposition to find freedom of speech or of the press more entitled to control the outcome than the other things at stake.⁶⁶ In a large and growing number of tort-related cases, the tendency is to address each new dispute simply as another exercise in conventional cost-benefit terms. The touchstone is that of reasonableness—did the newspaper act reasonably in light of what it might foresee, in light of what happened, in light of who might best have avoided

64. See 376 U.S. 254, 265-77 (1964).

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only. . . .

. . . .

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law. . . .

65. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981); see also W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 21-22 (1984).

66. A startling and distressing example was furnished by the Supreme Court just this term by the five-four decision in *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118 (1984). A flat ban on posting notices on any public property was upheld even as applied to traditional, short-term political posters tacked onto utility poles, and despite the city's acknowledgement that the posters presented no public safety hazards. Nothing more substantial than the marginal gain to the avoidance of "aesthetic pollution" was thought necessary to sustain the ban, despite its application to a highly traditional form of political speech, its application to traditional public places, and its necessary tendency to confine issue or candidate presentations to more costly and privately controlled media. The decision is a very substantial step beyond other recent "balancing" cases, such as *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), and *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

what happened, and in light of who can best absorb the cost?⁶⁷

In the abstract, there is nothing evidently amiss. Indeed, any other address might seem quite misplaced. In the concrete, however, this process manages gradually to push something out of account—that the first amendment exempts free speech and freedom of the press from being treated simply as any other activity examined in the common law. The first amendment “subsidizes” these activities, disallowing the same latitude of conventional cost-benefit analysis that common law courts may apply to other things such as driving cars or selling suits of clothes.

In a very important case decided in 1927, it was ironically Louis Brandeis who powerfully suggested this thought in his opinion in *Whitney v. California*.⁶⁸ The coincidence is ironic because it was Brandeis himself who had urged legal recognition of compensable rights of privacy.⁶⁹ “Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society,”⁷⁰ Brandeis insisted. He illustrated the point by supposing a case where a speaker deliberately incited others to trespass on privately owned, albeit vacant land. Although the specific trespassers might be held, Brandeis opined that the speaker could not be similarly held.

From the dictum in *Whitney v. California*, literally dozens of significant decisions followed.⁷¹ The point was a major addition to the “clear and present danger” test, the test that forbade the imposition of sanctions in the absence of evidence of some harm clearly and imminently threatened by speech or publication. The addition was that certain harms would simply have to be endured even if actually precipitated by speech or publication. The strong view of the first amendment thus cut across the usual balancing of the common law. Speech is not merely entitled to equal protection of that law. In many of the subsequent cases, the most recent and impressive being the series of lower cases arising from proposed

67. See *supra* notes 47-51 & 61.

68. 274 U.S. 357, 377 (1927).

69. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1980).

70. *Whitney v. California*, 274 U.S. 357, 377 (1927).

71. For additional cases and discussion, see W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 335-37, 107-08 nn.38, 46 (1984).

neo-Nazi marches in Skokie, Illinois,⁷² the point held: seriously offended sensibilities, as well as ordinary annoyances, apprehensions, and personal inconvenience, are part of the cost of free speech—and not a sufficient justification for its discouragement.

Coming from a different direction some years ago, Harry Kalven also came to a similar conclusion.⁷³ He cautioned then that the new privacy torts ought not be seen as altogether progressive. He asked quite forcefully, rather, “[w]ere Warren and Brandeis [w]rong?”⁷⁴ in promoting additional remedies for felt insults to one’s dignity. Rhetorically, he asked, “[i]f infliction of emotional harm in this special way is now actionable on the grounds of underlying principle, why should not all intentional infliction of emotional harm be recognized?”⁷⁵ At the time, it was plain that, by putting the question this way, he meant to imply that of course such a development would be ill-advised and, accordingly, that the proliferation of ad hoc privacy torts that actually stood on no firmer ground than this ought likewise be reconsidered. Today, however, the question has lost its rhetorical force and probably only a strong view of the first amendment can suffice instead. In the end, it will take something more nearly like this sort of strong view that cuts across the categories of common law balancing the Supreme Court as well as other courts now too detachedly pursue.

Tort law may appear to make the point more difficult to appreciate, but in fact there is no reason to think the civil auspices of a case can affect the strength of the principle of *Whitney*. Tort law obscures the relevance of the principle because the subsidy to speech reflected by restricting the criminal law may seem to be a

72. See *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Part of Am.*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978). These decisions were severely criticized by some—mistakenly, I believe. See, e.g., Horowitz & Bramson, *Skokie, the ACLU and the Endurance of Democratic Theory*, LAW & CONTEMP. PROBS., Spring 1979, at 328; Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DE PAUL L. REV. 259 (1979). But see A. NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979).

73. See Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, LAW & CONTEMP. PROBS. 326 (1966).

74. *Id.*

75. *Id.* at 330. See also W. PRATT, *PRIVACY IN BRITAIN* (1979) (noting the extent to which Warren and Brandeis drew on English material—and the extent to which their enthusiasm for additional protection has not caught on in England).

subsidy merely borne by the community as a whole and need not say anything as to whether related civil suits would be similarly regarded.⁷⁶ But test it out and see whether the distinction should hold. On the facts of *Whitney* itself, given today's view of expanded liability, the landowner could presumably sue for damages first from the trespassers for trespass, of course, and alternatively from the speaker for negligence proximately resulting in damage by trespass, and perhaps for the intentional infliction of emotional distress as well. The speaker's speech most certainly foreseeably brought about the trespass; the speaker owed the landowner a "duty" to take care not to speak in ways proximately resulting in that harm, yet recklessly and even knowingly disregarded that duty. Compensation is thus due and, the standard of recklessness being met, presumably punitive damages are authorized. Given the facts of the case, an action for the intentional, and certainly the negligent, infliction of emotional distress may lie as well. But if the principle as Brandeis saw it is correct, this will not be the result. The first amendment forbids it. The premium on speech, conferred by the first amendment, exempts it from answering for some minor harms even directly and immediately brought about by the speech. Thus, the assumption that the ordinary calculus of the law of torts that seeks merely to distribute the costs fairly, according to its own usual jurisprudence, is mistaken.

In an equivalent fashion, the subsidy to speech and to publication conferred by the first amendment may similarly mean that that subsidy forbids the usual standard of extended proximate cause reasoning to be applied when the issue is not whether the actual harm is sufficiently serious, but whether the defendant is too far removed from it to be held responsible. The same point is present as in the previous case. It is simply directed to a different issue. The question assumes that according to the general, existing standard of proximate cause in a given jurisdiction, the defendant's lack of foresight in anticipating how his act or omission might result in harm that he might have avoided by more reasonable precaution has been fully established in the plaintiff's case. Ac-

76. But see *New York Times Co. v. Sullivan*, 376 U.S. at 277 ("The fear of damage awards under a [tort] rule . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."); see also *supra* note 64.

cordingly, liability by that neutral standard would have been proved and only the damages would remain to be determined. Again, however, the merely usual, and thus seemingly most fair, application of that analysis assumes away, rather than answers, the strong view of the first amendment. That is, it would treat the newspaper defendant as entitled to as much protection as an equivalently positioned nonnewspaper defendant, thus treating the first amendment as a specialized equal protection clause, but no better. But a strong view of the first amendment cuts across that analysis. It disallows a tracing out of liability as would otherwise be altogether ordinary. The subsidy of free speech and publication disallows a mere assimilation of the first amendment as though it were but a special instance of the equal protection clause.

A truck owner who leaves an unlocked truck in a parking lot with the keys inside may in some jurisdictions have to answer to a remote plaintiff injured by a thief who stole the truck and subsequently struck the plaintiff,⁷⁷ but a newspaper publisher cannot be held similarly liable even though the case in which he or she is sued otherwise seems to be the same. To put the strong view still again, it is not the case that the first amendment provides equal protection of speech and of publication as other interests are protected according to each jurisdiction's standard tort law. Rather, it provides unequal protection and thus disallows the usual application of that standard tort law. Under a standard tort analysis, the court would ask simply whether the publisher might reasonably have provided a less detailed story, reducing the foreseeable risks to the plaintiff, without unreasonably omitting such material as was otherwise newsworthy. Under the first amendment more strongly viewed, that is not the question. Under the first amendment strongly viewed:

The choice of material to go into a newspaper and the decisions made as to . . . treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amend-

77. See, e.g., *Palma v. U.S. Industrial Fasteners, Inc.*, 203 Cal. Rptr. 626 (1984).

ment guarantees of a free press as they have evolved to this time.⁷⁸

Even discounting the quotation for its hyperbole—it is not true that under no circumstances may government regulate the exercise of editorial control and judgment either directly, such as through criminal statutes, or indirectly, such as through its law of torts—the point is still significant. Even if imposing liability would otherwise seem merely fair as that term would be derived from the same standard of negligence, or of proximate cause or duty, as the courts of the jurisdiction uniformly apply in all other negligence cases, it may not be imposed in this case. The strong view of the first amendment forbids it.

Reestablishing the first amendment in this fashion will not, of course, provide any final repose for these problems. There can be no final repose. But it may help arrest the tendency to undermine the first amendment that otherwise seems instinctive in the general tendency to lose it in the grasp of common law processes of the kinds we have been reviewing—and that much by itself may be useful.

78. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

